

**BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI.**

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is found at Tr. 84.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Title 28, Section 347, and Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of Criminal Procedure of this Court (USCA).

The order of the Circuit Court of Appeals became final on July 23, 1945, on which date it denied the petition for rehearing (Tr. 91).

ARGUMENT.

**The acts of the agents were the essential elements
of the offense.**

When Agents of the Federal Bureau of Investigation were brought into the case they immediately took charge, elected to proceed and give orders. The acts of the personnel, from that time, became the acts of the Agents. These acts are setting up of a counterfeit induction center, interviewing and instructing inductees, filling out and indorsing selectees' examination (buck sheet) not in the presence of the selectees, thereafter, the delivery thereof to the selectees and instructing them to re-enter the line of examination, where under supervision and orders of the Agents, the examination sheet was collected and selectees sent home.

It is our further contention the facts in this case fall within the cases mentioned in the case of *Sorrels v. United States*, 287 U. S. 435, 442, mentioned under the following:

"There may also be physical conditions which are essential to the offense and which do not exist in the case of a trap, as for example, in the case of a prosecution for burglary where it appears that by reason of the trap there is no breaking. *Rex. v. Egginton*, 2 Leach, C.L. 913, 168 Eng. Reprint 555; *Reg. v. Johnson*, Car & M 218, 174 Eng. Reprint 479; *Saunders v. Peo.*, 38 Mich. 218; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117; *Allen v. State* 40 Ala. 334, 91 Am. Dec. 477; *Love v. Peo.*, 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710."

It is not contended that the facts in the instant case fall within the *Sorrels* case, but they fall under the above sen-

tence of that case. This Court appears to have approved the principle set forth in the case.

Love v. Peo., *supra*, which has been cited in and by #1 Wharton Criminal Law, page 527, sec. 390, 1932 ed., which states:

"The decoys and detectives so long as they do not cease to be decoys and detectives and not become the originators of the criminal act *or do some overt act constituting the offense charged* are not guilty of the crime charged although apparently lending their aid and cooperation." (Italics Ours.)

In the 15 American Jurisprudence, section 335, page 25, it appears:

"However, a different situation is presented where the defendant, intending to commit a crime, proposes to a third person to assist in it, and he seeking to decoy the defendant and secure his conviction, assents to the scheme and assists in carrying it out after notifying the authorities. In such a case the defendant cannot be convicted unless he does or participates in all the acts necessary to constitute the crime. The principle here involved is that the defendant cannot be charged with any act done by the decoy, because the decoy has no criminal intent."

Among the authorities cited in support of the principal is *State v. Hayes*, 105 Mo. 76, 16 S.W. 514, 24 Am. St. Rep. 360, overruled on another point 142 Mo. 450, 44 S.W. 239, wherein the defendant proposed a burglary to one H who consented but notified the authorities. The defendant and H went to the building in question and the defendant opened a window and assisted H to enter. H handed out goods to the defendant who carried them away. It was held that the defendant could not be convicted of burglary because he had not done all the acts essential to constitute that crime.

In *State v. Jansen*, 22 Kan. 498, cited in *State v. Hayes*, *supra*, the Court, quoting Judge Brewer, said:

“The act of a detective may not be imputable to the defendant as there is a want of community of motive. The one had a criminal intent, while the other is seeking the discovery and punishment of crime.”

The instant prosecution is predicated upon the evasion of services in the Armed Forces of the United States in violation of Section 311, Title 50, Appendix, USCA, which is as follows:

“Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of

the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m., E.S.T., c. 720, sec. 11, 54 Stat. 894."

CONCLUSION.

It is respectfully suggested that the question urged is substantial. It is not idle or frivolous. It is a question as we view of conviction for a crime the defendants did not commit.

WHEREFORE, we further suggest that the record is such that in the exercise of the discretion reposed in this Court the writ of certiorari be granted, and the cause reviewed.

All of which is respectfully submitted.

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August 14, 1945,
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